

EU-China Trade Project (II)

Evidentiary issues in antimonopoly cases

- *Beijing, 17 March 2015* -

THE *INTEL* CASE

- Vivien Terrien -

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COMMISSION DECISION

“INTEL”

13 May 2009

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Commission decision, *Intel*, 13.5.09

Facts

- Intel: microchip manufacturer
- 13 May 2009: Commission decision
 - Main general facts:
 - €1.06 billion fine on Intel
 - **HIGHEST FINE EVER** IMPOSED BY COMMISSION ON A SINGLE COMPANY
 - abused its dominant position
 - on the worldwide market for x86 central processing units (CPU)
 - strategy aimed at foreclosing the only serious competitor, AMD
 - immediate order to bring an end to the infringement



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Commission decision, *Intel*, 13.5.09

Main elements on dominance (1/2)

1/. Market shares

- Intel found to hold a market share of $\approx 70\%$ or more

2/. Barriers to entry

- Extremely difficult for competitors to enter the market and to expand
 - \rightarrow unrecoverable investments to be made in R&D, IP and production facilities
- *Intel* \rightarrow operating margins // *Microsoft's* in COM decision ($\approx 81\%$)
 - Level of profitability \rightarrow confirmation of substantial market power
 - \neq Dell (9%) and HP (4%)
- UNAVOIDABLE SUPPLIER of x86 CPUs
 - customers \rightarrow no choice other than to obtain part of their requirements from Intel
 - strong brand status (must-stock)

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Commission decision, *Intel*, 13.5.09

Main elements on dominance (2/2)

3/. Evidence of actual competition

- Evidence of falling prices → not inconsistent with dominance
 - Microprocessor industry is characterized by rapid technological progress
 - Falling prices are an intrinsic characteristic of this industry

- All Intel's competitors, except AMD,
 - Have exited the market; or
 - Are left with insignificant market share

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Commission decision, *Intel*, 13.5.09

Main elements on abuse (1/3)

- realized through several measures adopted by Intel
- vis-à-vis its own customers
 - Dell, Lenovo, HP, Acer, NEC
- vis-à-vis the European retailer of microelectronic devices
 - Media-Saturn-Holding

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Commission decision, *Intel*, 13.5.09

Main elements on abuse (2/3)

- 1/. rebates to four major manufacturers (Dell, Lenovo, HP, NEC)
 - condition: purchase from Intel all or almost all their x86 CPUs
- 2/. reward payments to Media-Saturn
 - condition: exclusive sales of computer containing Intel chips
- 3/. payments to three computer manufacturers (HP, Acer, Lenovo)
 - condition: postpone or cancel the launch of AMD CPU-based products, and/or
 - condition: put restrictions on the distribution of AMD CPU-based products

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Main elements on abuse (3/3)

- Rebates and payments → loyalty
 - significant diminution of competitors' ability to compete on merits
 - reduction of consumer choice
 - lower incentives to innovate

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CASE T-286/09

INTEL CORP. V. COMMISSION

12 June 2014

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Evidentiary issues in antimonopoly cases

Case T-286/09, *Intel Corp. v. Commission*, 12.6.14

Procedure

- 22 July 2009: Action for annulment before the EU General Court
- 12 June 2014: EU General Court judgment
 - → Intel's action is dismissed in its entirety
- 28 August 2014: Appeal to the EU Court of Justice
 - Case C-413/14 P, *pending*



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MAIN FINDINGS RE THE ABUSE

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Case T-286/09, *Intel Corp. v. Commission*, 12.6.14

ABUSE #1: Exclusivity rebates

Need to prove **actual** foreclosure effect?

NO

Need to prove **potential** foreclosure effect?

NO

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Case T-286/09, *Intel Corp. v. Commission*, 12.6.14

ABUSE #1: Exclusivity rebates

Need to prove **casual link** between any effect and the rebates?

NO

Can **competitors' growth** demonstrate absence of abuse?

NO

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Case T-286/09, *Intel Corp. v. Commission*, 12.6.14

ABUSE #1: Exclusivity rebates

Should the **AEC test** be applied to show foreclosure?

NO

Need to proceed to a **case-by-case analysis** taking into account all the circumstances of the case?

NO

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Case T-286/09, *Intel Corp. v. Commission*, 12.6.14

ABUSE #1: Exclusivity rebates

→ *Per se* abuse?

By their very nature, they are capable of
restricting competition and foreclosing competitors

Incompatible with the objective of undistorted competition
with the common market

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Case T-286/09, *Intel Corp. v. Commission*, 12.6.14

ABUSE #1: Exclusivity rebates

3 categories of rebates (1/5)

■ **Quantity rebates**

- solely linked to **volume of purchases** from dominant company
- generally considered not to have the foreclosure effect
- if quantity supplied increases → lower costs for the supplier
 - supplier is entitled to pass on that reduction to the customer
 - in the form of a more favorable tariff
- reflect **gains in efficiency** and **economies of scale**

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ABUSE #1: Exclusivity rebates

3 categories of rebates (2/5)

■ Exclusivity rebates (1/3)

- conditional on the customer's obtaining **all or most** of its requirements from the undertaking in a dominant position
- close to *per se* abuse
 - not based on an economic transaction which justifies this burden or benefit
 - designed to remove/restrict purchaser's freedom to choose his sources of supply
 - designed to deny other producers access to the market
 - **save in exceptional circumstances**

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Case T-286/09, *Intel Corp. v. Commission*, 12.6.14

ABUSE #1: Exclusivity rebates

3 categories of rebates (3/5)

■ Exclusivity rebates (2/3)

- **foreclosure** effect occurs not only where access is **impossible** for competitors but also where that access is made **more difficult**
- thus, **no need** to demonstrate **capacity to restrict** competition depending on the circumstances of the case

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ABUSE #1: Exclusivity rebates

3 categories of rebates (4/5)

■ Exclusivity rebates (3/3)

- Moreover, in *Intel*, dominant company = **unavoidable trading partner**
 - customers → part of their requirements from Intel (non-contestable share)
 - competitor → not in a position to compete for the full supply (contestable share)
 - exclusivity rebates + unavoidable partner → more difficult to supply
 - i.e. failing to comply with the exclusivity condition
- risks losing not only the rebates for the units that it switched to that competitor, but the entire exclusivity rebate
- to submit an attractive offer → need to offer attractive conditions for the units that that competitor can itself supply to the customer; BUT ALSO offer compensation for the loss of the exclusivity rebate
- Thus, exclusivity rebates enables dominant company to use its economic power on the non-contestable share as leverage to secure also the contestable share

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ABUSE #1: Exclusivity rebates

3 categories of rebates (5/5)

■ **Other rebates**

- financial incentive not directly linked to (quasi)exclusive supply
- rebate may have a fidelity-building effect
- e.g., attainment of individual sales objectives
 - do not contain any obligation to obtain all or a given proportion of supplies
- necessary to consider all the circumstances

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JUSTIFICATIONS?

Principles re justification analysis (1/2)



- The conduct is **objectively necessary**
 - Case 311/84, *CBEM*, 3.10.85, para. 27
- Exclusionary effect is **counterbalanced/outweighed**
 - by advantages in terms of **efficiency** that also **benefit consumers**
 - Case C-95/04 P, *British Airways/Commission*, 15.3.07, para. 86

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JUSTIFICATIONS?

Principles re justification analysis (2/2)



- Thus, dominant company has to show that:
 - the efficiency gains likely to result from the conduct **counteract any** likely negative effects on **competition** and **consumer welfare** in the affected markets
 - those gains have been, or are likely to be, brought about **as a result** of that conduct
 - such conduct is **necessary** for the achievement of those gains in efficiency
 - it does not eliminate effective competition by removing all or most existing sources of **actual or potential** competition

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JUSTIFICATIONS? (1/3)

Small market shares on markets targeted by rebates?

NO

Clients can still get products from competitors on other segments?

NO

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JUSTIFICATIONS? (2/3)

In case exclusivity not respected
no sanction (reduction or cancelation) really applied?

NO

Existence of a threat is enough

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JUSTIFICATIONS? (3/3)

Objectively necessary or potential foreclosure effect
counterbalanced by efficiency for consumers?

Possible

Intel did not put forward any argument in that regard

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EVEN IF **EFFECT-BASED APPROACH**

- AEC test
 - concerns only impossible access
 - ≠ more difficult access
- If test result = negative
 - competitor cannot cover its costs to get the contestable share
- If test result = positive
 - competitor can cover its costs to get the contestable share
 - HOWEVER doesn't mean that eviction effect doesn't exist
 - access is still more difficult, even if economically-speaking "possible"

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ABUSE #2: Reward payments (Naked restrictions)

- Conditions to get the payments
 - sales orientation of competitor's products
 - obligation to forbid distributors to stock competitor's products
 - launch postponement/cancellation of competitor's products
- Result of these three conditions
 - more difficult market access for competitors
- Willingness behind these conditions
 - targeted to one specific competitor
 - to cause harm → anticompetitive object
 - ≠ competition on the merits (at least, not clear)

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Case T-286/09, *Intel Corp. v. Commission*, 12.6.14

ABUSE #2: Reward payments

Effect-based approach (1/3)

What about the proof of qualified/concrete effects?

Only alternative approach

Commission cannot be passive towards threat on effective competition structure of the common market

Even though the threat **has not or has not yet** produce any effects

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ABUSE #2: Reward payments

Effect-based approach (2/3)

What about immediate, substantial and foreseeable effects?

“unique and continuous infringement”

no need to look at isolated behaviors

sufficient to look at it **globally**

→ enough if **susceptible** to have substantial effects

Otherwise

individually taken → none of these behavior with substantial effects

BUT same aim pursued → all together = substantial effects

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ABUSE #2: Reward payments

Effect-based approach (3/3)

What about implementation of these measures?

Implementation by client \neq Intel

→ artificial approach

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Value of third party's declaration

Can abuse be proven based on 3rd party declaration?

YES

- No interest to incriminate the dominant company
 - ≠ Cartel (article 101 TFEU) → participants' declarations
- Should be sufficient in itself to demonstrate the infringements

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MAIN FINDINGS RE PROCEDURE

→ *Ulrich von Koppenfels*

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CASE C-413/14 P

INTEL CORP. V. COMMISSION

- Pending -

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Main grounds of appeal

1

APPLICATION OF THE WRONG LEGAL STANDARD

→ *Should have been effect-based approach*

- Cannot conclude → conduct was inherently capable of restricting competition
 - without considering **all of the relevant facts and circumstances** surrounding it
- Cannot establish an abuse in assessing capability to restrict competition
 - on the basis of abstract considerations rather than **likely or actual effects**
- Wrong alternative finding (= conduct was capable of restricting competition)
 - factors taken into account cannot establish that capability; and
 - relevant factors were not considered, such as
 - the market coverage of the practice, the duration of the alleged practices,
 - actual market evidence of rapidly declining prices and a lack of foreclosure; and
 - the conclusions to be properly drawn from the as-efficient competitor (AEC) test

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Main grounds of appeal

2 NO INFRINGEMENT FOR THE LAST TWO YEARS
→ *Small part of the relevant market affected*

- the final 2 years of the alleged period of infringement
- the market coverage of the conduct would have affected, at most, a mere 3.5 % of the relevant market

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Main grounds of appeal

3

WRONG QUALIFICATION OF THE CONDUCT

→ *Cannot be qualified as 'exclusivity rebates'*

- conduct affects small part of competitors' customers' requirements
 - only 28 % (HP) and < 42 % (Lenovo) of each customer's total purchases
 - ≠ 'all or most' of these customers' requirements

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Main grounds of appeal

4

VIOLATION OF EFFECTIVE JUDICIAL PROTECTION & PROCEDURAL FAIRNESS PRINCIPLES

→ *Meeting with Dell executive*

- Not sufficient to disclose a mere list of topics discussed
 - obligation to **provide a record or summary** of what was said
- Wrong appraisal of burden of proof
 - only to show → **not excluded** that material **could be used** for defense
 - not to adduce prima facie evidence that Commission failed to record exculpatory evidence

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Main grounds of appeal

5

WRONG APPRAISAL OF EU JURISDICTION

- No jurisdiction over certain Intel's agreements with Lenovo
 - not 'implemented' in the EEA
 - b/c Intel did not sell any products to Lenovo in the EEA under these agreements
 - 'qualified effects' test is not an appropriate basis
 - b/c not foreseeable that these agreements for delivery in China
 - would have an immediate and substantial effect within the EEA

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Main grounds of appeal

6

WRONG CALCULATION OF THE FINE

- Manifestly disproportionate
- Violation of fundamental principles of EU law
 - cannot apply Commission's 2006 fining guidelines
 - to conduct that had pre-dated them

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**CONCLUSIONS DRAWN
BY THE COMMISSION**

→ *Ulrich von Koppenfels*